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Supreme Court, U.S.
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No. 95-545

In The

Supreme Court of the United States

October Term, 1995

ARLENE KURTZ,

Petitioner,

vs.

CITY OF NORTH MIAMI, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari From The Florida Supreme Court

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. Should the Court consider a constitutional question which was not raised in the state supreme court below?

II. Should the Court consider whether the Due Process Clause of the Fourteenth Amendment prohibits a state or local government from deciding not to hire tobacco users as public employees where Petitioner conceded that a workforce containing fewer tobacco-users is more productive and less costly, regardless of particular job function, and where the record evidence is overwhelming, undisputed and unrebutted that the City of North Miami's employment policy is legitimate and rational in every respect?

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JURISDICTION

The jurisdiction of this Court has erroneously been invoked under 28 U.S.C. § 1254(1). The Court arguably has discretionary jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner claims this case arises under the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

As will be shown below, there is no plausible federal constitutional issue raised by the petition in this case. The United States Constitution does not forbid governments, when deciding whom to employ as public servants, from rationally taking into account the real and substantial additional costs of employing tobacco-users. Moreover, the abstract constitutional question posed by Ms. Kurtz (in essence: "Does the Fourteenth Amendment bar discrimination against tobacco-users?") was never raised, presented or argued in the Florida Supreme Court below. Moreover, Kurtz neglected to introduce at trial **one scintilla of evidence** challenging the legitimacy or rationality of the City's regulation, and **did not even dispute** the City's overwhelming proof of legitimacy and rationality.

To lure this Court into considering whether local communities ought to be precluded by "substantive due process" considerations from rationally taking tobacco-use into account when deciding whom to employ as

public servants, Kurtz has misstated the record facts, the procedural history of this case, and even the court rulings below. As shown below, the only *bona fide* issues presented by this case relate to Florida appellate procedures and Petitioner's failure to carry her evidentiary burden in the trial court, issues which present no important or novel issue for Supreme Court consideration.

The City of North Miami is self-insured and its taxpayers pay for **all** the medical expenses of its employees. In 1990, the City adopted a policy of not hiring individuals who used tobacco in the 12-month period preceding their application. The policy only requires job applicants to certify that they have not smoked for the preceding year and does not affect current employees or even new employees who might later begin to smoke after their employment; the policy seeks only to gradually reduce the number of smokers in the public workforce by means of natural attrition. The policy was grounded on overwhelming, unrebutted and undisputed empirical evidence, some of which is cited in the Regulation itself, that reducing the number of smokers in the workforce will in fact save millions of public tax dollars which otherwise will be needlessly wasted on the self-inflicted illnesses of smokers and the cost of their overall higher absenteeism and lower productivity.

Ms. Kurtz sued to enjoin the City's policy on various Federal and State constitutional grounds. After many hearings over many months, and the careful consideration of the City's voluminous evidentiary showing of legitimacy and rationality (**Ms. Kurtz having submitted no evidence to the contrary**), the State trial judge held the City's policy to be reasonable and constitutional in all respects.

A. The Only Issue Before The Florida Supreme Court Was A State-Law Certified Question.

After the circuit court sustained the City's policy, Kurtz appealed to the district court of appeal, Florida's intermediate appellate court. The district court erroneously ruled that the City's policy violated the **Florida Privacy Amendment,** Article I, Section 23 of the Florida Constitution, because the City had failed to prove a "compelling need" for its policy. The district court explicitly stated that it was not considering or deciding any federal issue. *Kurtz v. City of North Miami*, 625 So. 2d 899, 901 (Fla. 3d DCA 1993), *quashed*, 653 So. 2d 1025 (Fla. 1995). After rendering its decision solely on the state-law issue, the district court certified its state-law ruling to the Florida Supreme Court for review pursuant to the latter's "certified question" jurisdiction under Article V, Section 3(b)(4), Fla. Const., and Florida Appellate Rule 9.030(a)(2)(A)(V), which allowed the Florida Supreme Court to review the "question certified" by the district court. **The "question certified" was solely the state-law issue decided by the district court, namely whether Article I, Section 23 of the Florida Constitution barred the City's employment policy.**[1]

Accordingly, as the Supreme Court of Florida emphasized in its opinion, the **only** question before it was the

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[1] Petitioner has violated Supreme Court Rule 14 by failing to provide this Court with the district court's opinion or its certification order. The City has included the certification order in its Appendix at App. 1; the district court's opinion is reported at 625 So. 2d 899.

state privacy law question decided and certified by the Third District, to wit:

> Whether applicants seeking government employment have a reasonable expectation of privacy under article I, section 23, as to their smoking habits.

(Petitioner's Appendix at A-35). The Florida Supreme Court proceeded to answer **that** state law question:

> For the reasons expressed, we answer the certified question in the negative, **finding that Florida's constitutional privacy provision does not** afford Arlene Kurtz, the job applicant in this case, protection under the circumstances presented.

(Petitioner's Appendix at A-36; emphasis supplied). To ensure that no one misconstrued its limited state-law ruling, the Florida Supreme Court *reiterated* that its ruling was limited to the narrow state-law question presented: "In reaching the conclusion that the right to privacy is not implicated in this case, however, we emphasize that our holding is limited to the narrow issue presented." (Petitioner's Appendix at A-39).

Kurtz did not argue to the Florida Supreme Court that the City's policy violated the Due Process Clause, or the Fourteenth Amendment, or even the United States Constitution generally. Neither Kurtz nor the City briefed any issue except the state-law issue described in the district court's certified question, which was the only issue decided by the Third District and the only issue before the Florida Supreme Court. Indeed, the City's initial and reply briefs to the Florida Supreme Court

specifically noted that no federal constitutional issue was before the court.[2]

Because the only issue presented to the Florida Supreme Court was the state-law issue decided and certified by the district court, and because neither party addressed any federal issue, this Court should deny Kurtz's petition. *See Illinois v. Gates*, 462 U.S. 212 (1983) (declining to address a question not presented to the Illinois Supreme Court); *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 (1981) (refusing to consider a similar due process argument which the petitioner had not presented to the appellate court below); *Webb v. Webb*, 451 U.S. 493 (1981) (dismissing a writ for want of jurisdiction because the federal question had not been advanced in the briefs to the Georgia Supreme Court, or in the rehearing motion therein); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (refusing to consider an issue not raised in the party's

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[2] Initial Brief at 49; Reply Brief at 10-11. Kurtz's brief to the Florida Supreme Court specifically stated that the issue presented for review was whether Article I, Section 23 of the Florida Constitution barred the City's policy (Kurtz Brief at p. 1); she argued **only** that the City's policy violated Article I, Section 23. Kurtz **never** argued that the City policy violated the Fourteenth Amendment; neither the Fourteenth Amendment nor the Due Process Clause is **even cited** in her table of citations. (Relevant portions of the parties' Florida Supreme Court briefs are included in Respondent's Appendix at App. 3-43.) Nor did Kurtz, pursuant to Florida Appellate Rule 9.330, suggest that the district court had **overlooked** a Fourteenth Amendment issue; nor did Kurtz request the district court to certify a federal-law issue to the Florida Supreme Court pursuant to Appellate Rule 9.030(a)(2)(A)(V); nor did Kurtz ask the Florida Supreme Court to **consider** any Fourteenth Amendment non-certified non-issue.

brief to the appellate court below); *A. Dickes v. Kress & Co.*, 398 U.S. 144, 147 (1970) (declining to consider an issue not raised in the appellate court below); *McGoldrick v. Compagnie Generale*, 309 U.S. 430 (1940) (refusing to consider a constitutional argument not presented to the New York Court of Appeals); and *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937) (emphasis supplied):

> Before we may undertake to review a decision . . . it must appear affirmatively from the record, not only that the federal question **was presented for decision to the highest court of the State** having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54, and cases there cited.

Finally, the Florida Supreme Court did not "decide" a question of federal constitutional law, and certainly not a question of due process, which term is not even mentioned in its opinion.[3]

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[3] The Florida Supreme Court's reference to the federal "implicit privacy" doctrine – not Due Process – was pure *obiter dictum* wholly unnecessary to the court's determination of the state-law privacy question presented. *See Coastal Petroleum v. American Cyanamid*, 492 So. 2d 339, 344 (Fla. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Ciongoli v. State*, 337 So. 2d 780 (Fla. 1976); *State ex rel. Biscayne Kennel Club v. Board of Business Reg.*, 276 So. 2d 823-826 (Fla. 1973); *Hart v. Stribling*, 6 So. 455, 456 (Fla. 1889) (Florida Supreme Court dictum on an issue "not then before the court" is a "gratuitous impertinence," which, "whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it.") *See also Street v. New York*, 394 U.S. 576, 581-582 (1969) (a federal question must be both presented to and "necessarily decided" by the State's highest court); and *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945) (record must reflect that federal issue was raised and decided by State's highest court). For an

That the Florida Supreme Court **did not decide** any federal (non)issue, much less a federal due process (non)issue, is proved by the fact that after the Florida Supreme Court rendered its decision, Kurtz filed a lengthy (19-page) motion for rehearing – nearly twice as long as her Petition to this Court – which described everything Kurtz considered wrong with the court's opinion **yet did not once mention, cite or even elliptically refer to the Due Process Clause, the Fourteenth Amendment, the United States Constitution, nor to a single decision by this Court.** On the contrary, the 19-page rehearing motion argued only that the court had misconstrued Article I, Section 23 of the Florida Constitution, which is cited at least 25 times in her motion.[4] *See Beck v. Washington*, 369 U.S. 541, 553 (1961), where the Court refused to entertain an argument not made in the Petitioner's rehearing motion to the state supreme court; and *Webb v. Webb, supra*, to the same effect.

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illustration of this Court's treatment of such *obiter dictum, see Myers v. United States*, 272 U.S. 52, 141-142 (1926), describing as *dictum* Chief Justice Marshall's remarks in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), regarding presidential removal power, because it addressed matters not actually presented to the Court ("The question . . . was not argued to the Court by any counsel. . . . " *Id.* at 141).

[4] "In holding that the privacy protection in Article I, Section 23 applies only to . . . "; "In construing the reach of Article I, Section 23 . . . "; "The court misconstrued Article I, Section 23 . . . "; "Article I, Section 23 itself reveals . . . "; "Article I, Section 23 must extend to more . . . "; "The court's overly restrictive reading of Article I, Section 23 in this case. . . . " "The court has misapprehended the proper scope of the protection afforded by Article I, Section 23," etc.

Accordingly, the Florida Supreme Court decided only a state-law issue certified to it by the district court, and its passing comment about federal "implicit privacy" protection was (a) *obiter dictum*, a mere "make-weight" reference to an **analogous** federal doctrine; (b) dictum which addressed a matter which had not been decided by the district court and which had not been described in the certified question to the court; and (c) dictum on a non-issue which was not before the court and not argued or briefed by either party.

B. Kurtz's Portrayal Of The Factual And Procedural Predicate Of This Case Is Profoundly Inaccurate: In Fact The City Proved Through Undisputed And Overwhelming Evidence, Which Was Conceded By Kurtz, That Its Policy Was Both Legitimate And Rational, While Kurtz Proved Nothing At All.

Nearly all of the important "factual" statements in Kurtz's petition are either untrue or misleading, just as they were when Kurtz made the same misstatements to the Florida Supreme Court.[5]

In fact, the City submitted to the circuit court detailed and comprehensive affidavits and exhibits including multiple volumes – literally **thousands of pages** – of medical, economic and scientific data which **conclusively proved** that its policy was utterly rational

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[5] Because the very same misstatements were made to the Florida Supreme Court, the City includes in its Appendix, at App. 2-22 and 30-41, the pertinent sections of the City's Florida Supreme Court briefs providing the full record citations which refute Kurtz's distortions.

and would in fact promote legitimate – even "compelling" according to the Florida Supreme Court – public and governmental objectives. That empirical evidence was so overwhelming and conclusive that Kurtz did not even attempt a "pro forma" rebuttal: Kurtz submitted **no evidence whatever** to contradict the City's evidence, and responded by informing the circuit court that the evidence was all "immaterial," "irrelevant," and "undisputed." Kurtz's attorney argued that the circuit court should rule in her favor merely on the basis of abstract theory, without regard to the overwhelming evidence of rationality. **Kurtz thus "tried" her case solely on the basis of her attorney's argument that the City's policy was unconstitutional because she – Kurtz's attorney – could hypothesize supposedly better means of achieving the City's goals.**[6]

The City's evidence of rationality was so overwhelming and conclusive, in fact, that Kurtz **did not even depose** the City's expert witness whose lengthy and detailed affidavit concerning the critical medical and economic data supported the City's policy and was one of

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[6] Kurtz's attorney asserted to the trial court (and to every court thereafter) that the City's policy was "irrational" *because* the City had failed to adopt a similar policy aimed at Twinkie-eating skydivers; or because it would have been better for the City to impose a health insurance surcharge on smoking employees. *See, e.g.*, Kurtz's motion for summary judgment at pp. 13, 18, asserting (without evidentiary support) that it would be more rational for the City to deny smokers health insurance altogether, and that the City's policy was underinclusive in not addressing the hazards of automobile racing. However, Kurtz never submitted **evidence** in support of *any* claimed deficiencies in the City's policy.

the cornerstones of the City's evidentiary submission; nor did she depose any of the City officials who had been identified as the knowledgeable witnesses with respect to the City's employment and insurance practices. **Moreover, Kurtz did not submit any testimony or evidence of her own to oppose, challenge or contradict either the testimony of the City's witnesses or the multiple volumes of medical and economic data submitted by the City and cited by its expert, which evidence the trial judge spent months reviewing before ruling that the City's policy was, in fact, both legitimate and rational.**[7]

The trial court's ruling contained specific findings of fact based on its exhaustive review of the undisputed and unopposed evidence, and those findings of fact were not questioned by either of the appellate courts which reviewed the ruling and the undisputed evidence which supported it. The Florida Supreme Court even went so far as to remark that the City had actually proved ("under the special circumstances supported by the record in this case"; 653 So. 2d at 1028) a **compelling** justification for its

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[7] The City would have very much liked to have included in its Appendix some of the empirical evidence contained in the thousands of pages of scientific studies and detailed graphs and tables which proved beyond peradventure that the City's policy was rational. Unfortunately, it would be prohibitively costly to typeset those detailed evidentiary materials in accordance with the Supreme Court's Rules. However, the City has included in its Appendix, at App. 42-59, the title references to the research and data relied on by the City's expert witness and submitted to the trial court. The City's statement of the facts in its Florida Supreme Court brief (App. 6-21) also summarizes the salient facts proved by that undisputed record evidence.

policy, because the undisputed evidence was so overwhelming.

It would be profoundly unfair for Kurtz to be permitted now, three appellate courts removed from the evidentiary stage of the proceeding, to argue that the City's policy was "irrational" even though she failed to introduce **any evidence** to challenge the rationality of the policy. Had Kurtz identified in the trial court *any* factual disputes or uncertainties, the City and the trial court could have addressed and resolved them. However, it was *Kurtz* who challenged the policy and thus had the burden to prove that it was irrational, and it was **Kurtz** who abdicated that responsibility.[8]

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[8] Kurtz always conceded the legitimacy of the City's policy and only labeled the policy "irrational" in the special (and legally-spurious) sense that her attorney claimed that better alternatives could have been devised. She also conceded she had no constitutionally-protected right to a job with the City nor any constitutional rights as a tobacco-user. These concessions appear in virtually every Kurtz pleading and brief and in the transcripts of virtually every court hearing below. See, for example, July 25, 1991 hearing transcript (pp. 4, 24), April 8, 1991 hearing transcript (p. 6), July 8, 1991 transcript (pp. 20-21, 23), and December 6, 1991 transcript (p. 20), conceding that smoking affected employee productivity, that it was a proper goal for the City to keep its health insurance costs as low as possible, and "there are many legitimate means it could use to reach that goal." See also Kurtz's trial memorandum of May 8, 1991 (p. 5), conceding the legitimacy of the City's objectives; Kurtz's trial memorandum of April 8, 1991 (pp. 4-5, 40-41, 46-48), asserting that the City's policy was unconstitutional because there were (she claimed) less intrusive means to achieve the City's objectives. See also January 7, 1992 transcript (pp. 20-23), again conceding the legitimacy of the City's policy, and arguing that the policy should be struck down because

There are other glaring misstatements in Kurtz's petition which must be pointed out:

1. The district court did not question the trial court's ruling with respect to the legitimacy of the City's policy (which was unchallenged), and only held (erroneously) that the policy violated the Florida Privacy Amendment because the City had not proved a **compelling** need for the policy.

2. It is not true that the City's "sole asserted justification" for its policy was cost reduction. Though reducing the City's direct costs and expenditures was indeed a main objective, the City also submitted volumes of evidence concerning its interests in promoting worker productivity, reducing absenteeism, and promoting crucial local, State and National public health objectives.

3. The City's policy does not exclude from employment any person who has used tobacco. The policy only

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"they are excluding smokers today, tomorrow they are going to be excluding donut eaters" and "it's part of the analysis . . . in determining the rationality . . . to see if there are other groups who may impose similar risks to the city and whether they're being treated similarly or differently." *Id.* at 23. See also transcript of November 25, 1991 hearing (p. 14), wherein Kurtz's attorney stipulated that she was not claiming any property right to a City job. See also Kurtz's brief to the district court (p. 30), conceding that she had no right to a job with the City. To the same effect, see Kurtz's brief to the Florida Supreme Court (pp. 4, 16 and 20) conceding that Kurtz did not claim "a constitutional right to smoke" and specifically declaring that she was not claiming either a "right to smoke" or a "right to a City job."

excludes persons who used tobacco during the year preceding their application, and the City submitted unopposed and uncontradicted evidence supporting the rationality of that "one year cessation" requirement.

4. Kurtz's job interview was not "terminated." Kurtz formally withdrew her application for employment and never reapplied and her lawsuit did not even seek employment or a re-interview with the City. Thus when Kurtz states the City had no knowledge of her actual health condition, she neglects to reveal that the City could not possibly have such information in view of Kurtz's withdrawal of her application for employment.

5. There is **no evidence** in the record to support Kurtz's statement that the policy will or even **might** cause the City to hire a "less qualified nonsmoker" over a "more qualified smoker." That statement is pure fabrication. In fact, Kurtz stipulated that the policy did not have that effect, and the only evidence with respect to the relative "qualifications" of applicants is the undisputed evidence that a more qualified non-smoking applicant was hired instead of the poorly qualified Kurtz, who stipulated that she would not have been hired even aside from her smoking.[9]

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[9] Kurtz never introduced any evidence or testimony to show that less qualified applicants had or might be hired over more qualified applicants as a result of the City policy. Quite the contrary: At trial Kurtz conceded that she would not get the job she applied for because of the large number of "other more qualified candidates." See May 8, 1991 hearing transcript (pp. 39-40). In Kurtz's brief to the Third District she conceded at page 11 that the City has had as many as 500 applicants for a single job opening, a fact which plainly refutes her unsupported

6. Kurtz's statement that the City "does not give smokers the option of paying for any increased insurance costs that may result from their smoking" is another perennial canard, for the actual evidence is that City employees do not pay **any costs** relating to insurance or medical treatment, because the City is 100 percent self-insured and pays 100 percent of all of its employees' health care expenses; furthermore, the City cannot implement a policy of charging some employees "increased insurance costs" even if it wished to do so which it does not.[10]

7. Also erroneous is Kurtz's statement that the City did not "investigate actual health costs or productivity data" to justify its regulation. The City's briefs to the Florida Supreme Court demonstrate why that statement is both wrong and ridiculous. The record reflects that the City's policy was based on actual scientific data (**as the policy itself reflects**), which evidence Kurtz neither disputed nor opposed.[11]

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assertion that less qualified nonsmokers have been or would be hired over more qualified smokers.

[10] Even disregarding the fact that courts do not strike down a rational policy because "better" policies could be hypothesized, Kurtz did not introduce **a single molecule of evidence** supporting her attorney's unsubstantiated claim that it would be "better" or "fairer" or "less intrusive" to adopt a less generous or more discriminatory insurance program. Kurtz had the burden to prove that the City's actual policy was **irrational** – not that it was arguably inferior to other policies – and she did not carry that burden.

[11] In any event, the City's policy could have been based on merely rational assumptions without the City conducting scientific studies to determine its "actual health costs or productivity data." *See FCC v. Beach Communications*, 113 S. Ct. 2096 (1993).

8. It is completely untrue (and a perennial Kurtz misstatement) that the City's expert witness stated that each smoking employee costs the City an additional $349 to $435 per year, and that "from 57 to over 90 percent" of these costs would be eliminated by prohibiting smoking on the job. On the contrary, the City **actually proved** that the policy will save the City upwards of $4,611 per employee per year, and even that direct savings ignores the larger public health benefits. If Kurtz wished to challenge that evidence she should have introduced evidence to the contrary, but instead Kurtz declared that the City's evidence was undisputed and submitted no evidence of her own.

9. One other statement in Kurtz's petition deserves special attention:

> Petitioner Kurtz does not dispute that there is evidence to support the conclusion that smoking and tobacco use are linked to a higher risk of certain health problems. The Petitioner does not dispute that government employers may restrict, or even ban, smoking in government buildings or during work hours. She does not dispute that a government employer may, in order to reduce costs, implement a voluntary smoking cessation program, or similar voluntary measures. **She also does not dispute that a restriction on off-duty or even pre-hiring tobacco use may be justified for certain jobs.** . . .

Kurtz's Petition at p. 5 (emphasis supplied).

Indeed, Kurtz has **always** conceded both the legitimacy and essential rationality of the City's policy. When

Kurtz concedes the rationality of restrictions on employees' off-duty smoking, as in *Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10th Cir. 1987), and the rationality of not hiring tobacco-users "for certain jobs," Kurtz is *sotto voce* conceding the rationality of the City's **actual policy**, for she never introduced evidence that the City's actual policy is "irrational" in ways that her supposed "better alternatives" are not.[12]

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[12] To apply such "reasoning" to the leading Supreme Court decision cited by Kurtz (*Kelly v. Johnson*, 425 U.S. 238 (1976)), one must imagine that Mr. Kelly's attorney challenged the rationality of the police department's tonsorial regulations **solely** by asserting – without any evidentiary support – that it would be "better" if all policemen had to wear lighted beanies and neon tutus to achieve the government's goals of "recognizability" and "uniformity of appearance," without even bothering to submit any **evidence** that such proposed alternatives were "more rational" in any respect. Likewise, Kurtz submitted no testimony or evidence showing that it is "irrational" for the City to decide to gradually reduce the number of smokers in its workforce, rather than (as Kurtz proposed) hiring smokers but denying them health insurance benefits, or using spies and "smoking-police" to enforce off-duty smoking restrictions (a là *Grusendorf*). While Kurtz's attorney claims that the City's policy would be justified only "for certain jobs where a particular level of physical fitness is legitimately needed," there is literally *nothing* in the record to support that claim, and it overlooks the undisputed evidence that the City's policy was justified not by any concern that a smoking-typist is less qualified **as a typist**, nor a smoking-policeman less qualified **as a policeman**, but rather that a **workforce** of nonsmokers is more qualified as a workforce in terms of productivity and overall costs of morbidity, absenteeism, etc. Certainly Kurtz cannot claim – and in fact has not claimed – that lung cancer and the plethora of other illnesses caused by tobacco selectively affects firemen but not secretaries! As explained in the City's Florida Supreme Court briefs, the undisputed empirical evidence which justified the

It is and always has been **undisputed** that the City's policy is designed to achieve legitimate objectives – saving taxpayer money being only the most obvious – and Kurtz did not even attempt to show that the policy will not rationally advance and promote those legitimate objectives. That is why at trial and in the Florida appellate courts Kurtz consistently argued that the City's policy was unconstitutional because it was underinclusive (it ignores skydiving Twinkie-eaters); or overinclusive (it excludes individual tobacco-users who may not get sick); or, in the unsupported opinion of Kurtz's attorney, that other measures would somehow be "better."

Kurtz rightly eschewed any evidentiary challenge to the City's policy, and rightly informed the trial judge that the evidence was undisputed, because (1) No less than thirty-thousand (30,000) scientific studies have proven the cause-and-effect relationship between tobacco-use and a myriad of costly and debilitating illnesses, so that is a **FACT** which only fools and the tobacco-cartel would dispute; (2) It is thus rational on its face for an employer selecting a workforce to discriminate in favor of non-users of tobacco, especially a self-insured public employer who uses tax revenues to pay 100 percent of

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City's policy proved that smokers' higher rates of morbidity, mortality, and absenteeism meant they were more expensive and less productive overall as public workers, and therefore tobacco use was demonstrably related to **all employees' job functions**, in that the "job function" of *all* public employees is to perform their jobs (whatever the job may be), and obviously no job is performed when the employee hired to perform that job – any job – is not performing that job due to smoking-related illnesses.

employee medical expenses, because a more-healthy workforce is less costly and more productive regardless of particular job function; (3) If an employer hires only those who have not used tobacco in the preceding year (a category which includes all those who never used tobacco, those who have not for many years, as well as those who have successfully quit), that will tend to reduce the relative number of tobacco-users in the workforce, which will tend to produce a more-healthy workforce, which will tend to produce a less-costly and more productive workforce. *Q.E.D.*

Given the indisputable rationality of the challenged policy, the only question is whether it is legally illegitimate to rationally discriminate against tobacco-users. The answer is that some states have laws prohibiting such discrimination, some states do not, while still other states require such discrimination. As explained *infra* at footnote 18, Florida currently falls in the latter categories. While the States and Congress may define such rational discrimination as illegitimate, the Fourteenth Amendment to the United States Constitution does not command them to do so. Because tobacco-users are not a suspect class nor tobacco-use a fundamental right, all the Fourteenth Amendment demands is a reasonable governmental objective and a rational "fit" between the objective and the selected methodology. Here the legitimacy of the government's goals (lower costs, healthier workforce, higher productivity, etc.) and the rationality of the chosen method of achieving the goals (reduced number of tobacco-users in workforce) were **not even contested** by Kurtz, and were in any event proved beyond a reasonable doubt. Accordingly, unless the

Supreme Court is prepared to rule that *Nicotiana Tabacum* deserves a special place of honor in our pantheon of fundamental values, alongside Bibles, ballots and political broadsides, there is no arguable constitutional violation in this case and there never was one. Which leads to the final reason why Kurtz's Petition ought to be denied.

ARGUMENT

THIS CASE RAISES NO IMPORTANT OR UNDECIDED CONSTITUTIONAL QUESTION, AND THE FLORIDA COURTS' RULINGS ARE IN COMPLETE HARMONY WITH THE DUE PROCESS JURISPRUDENCE OF THE UNITED STATES SUPREME COURT.

Kurtz claims that the Florida Supreme Court's "ruling" is contrary to this Court's substantive due process jurisprudence (Petition at 6), yet she also claims that the "ruling" raises an undecided issue which this Court needs to resolve (Petition at 10). Aside from the fact that these claims are logically contradictory, both claims are untrue. This case raises no important or undecided constitutional issue, for even if the Florida Supreme Court had actually ruled on a federal "substantive due process" question (which it did not), that ruling would be **entirely consistent** with the past half-century of this Court's due process jurisprudence.

Of course, the abstract question must first be stated correctly:

> Does the Due Process Clause of the Fourteenth Amendment permit governments to discriminate against those applicants for public employment who use tobacco where it is an undisputed and indisputable fact that such discrimination will significantly reduce government expenditures, will result in significantly-improved worker productivity and reduced absenteeism, and will also help ameliorate the Nation's most serious public health problem?

As this Court explained in *Reno v. Flores*, 113 S. Ct. 1439, 1447 (1993), a substantive due process claim seeks to forbid the government from infringing a "fundamental liberty interest." Kurtz has never articulated **any** underlying liberty interest – fundamental or otherwise – which she contends is or ought to be protected in this case; and she has always conceded that she has no constitutional right to use tobacco **or** to be hired as a City employee. Certainly none of the cases cited by Kurtz – not one – indicate that the City has violated Kurtz's federal constitutional rights.

Kelly v. Johnson, supra, the principal case cited by Kurtz, plainly does not support Kurtz's suggestion that the City has encroached upon Kurtz's constitutional rights. Even ignoring the fact that it is preposterous to equate the "problem of sideburned cops" with the problem of 430,000 dead Americans each year (and millions more dying and disabled and tens of billions of wasted dollars, etc.) caused by the scourge of tobacco, *Kelly* held that since fundamental liberty rights were **not** at stake, the employer's mere desire to maintain employee

"similarity of appearance" and "recognizability" was sufficient justification to defeat the respondent's Fourteenth Amendment challenge to a city's grooming regulations:

> We think the answer here is so clear that the district court was quite right in the first instance to have **dismissed** respondent's complaint. Neither this court, the court of appeals, nor the district court is in a position to weigh the policy arguments in favor of and against [the regulation]. The constitutional issue to be decided by these courts is whether petitioner's determination that such regulation should be enacted is so irrational that it may be branded 'arbitrary'. . . .

425 U.S. at 247-248 (emphasis supplied).

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), also cited by Kurtz, this Court rejected a due process challenge by a teacher who was not (**re**-)hired for a public job:

> [O]n the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another. . . . Respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment.

408 U.S. at 575-579.

Kurtz also cites *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), which sustained a Massachusetts law requiring the termination of police officers when they reached age 50, based on the state's claim of a

general relationship between age and physical ability. This Court stated that since no fundamental right or suspect classification was involved, "bare rationality" was all that was required to sustain the statute, and so the state was not required to test individual "fitness" for a job even if that might be a "better" means of achieving the government's goal:

> That the state chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally related to a maximum age limitation. . . . [W]here rationality is the test, a state 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'

427 U.S. 307 at 316. The undisputed evidence in this case proved a far more robust relationship between tobacco-use and high worker morbidity, absenteeism and medical costs, and low productivity, than the claimed relationship in *Murgia* between age and physical ability.

Another case cited by Petitioner is *Vance v. Bradley*, 440 U.S. 93 (1979), which also addressed a regulation terminating government employees based on age, and this Court reiterated that when neither fundamental rights nor suspect classifications are involved, the wisdom and efficacy of such regulations are to be addressed through the democratic process unless the plaintiff shows that the regulations are truly irrational. In *Vance* the Court upheld the rule as rationally-related to the government's goal of boosting productivity, and observed again

that even if the rule was both under-and over-inclusive, that did not permit the courts to invalidate the policy:

> Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'

440 U.S. at 108.[13]

The Court noted in *Vance* that appellees had admitted the relationship between age and reduced capabilities, just as Kurtz has conceded, over and over again (even in

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[13] The Court stated that an **assumed general relationship** between age and physical condition was a sufficiently rational basis for the regulation, and the fact that some older employees could have continued to perform despite their age, or that some younger employees could not, was irrelevant to the question of rationality. "Whether we, or the district court, think Congress was unwise in not choosing a means more precisely related to its primary purpose is irrelevant." *Id.* at 109. The Court also held that the government did not even need empirical evidence to justify its regulations:

> Appellees seem to believe that appellants had to have current empirical proof that health and energy tend to decline somewhat by age 60 and had to offer such proof for the district court's perusal before the statute could be sustained. . . . **[H]owever, those challenging the legislative judgment must convince the Court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.** . . . Appellees have not satisfied these requirements.

440 U.S. at 110-111. *See also City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51-52 (1986).

her Petition to this Court), the indisputable relationship between tobacco use and a myriad of illnesses and disabilities. In *Vance* as in the instant case, the employee argued that other policies would be fairer and more efficacious, and this Court replied that it was not within the competency of the courts to arbitrate such disputes over policy alternatives. *Id.* at 112.[14]

In *Grusendorf v. City of Oklahoma, supra,* the court upheld a far more intrusive and draconian "anti-tobacco" employment policy, one which led to the **firing of an employee** for taking three puffs of a cigarette while off-duty, and it did so **without** any of the overwhelming evidence of rationality which exists in the instant case.[15]

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[14] *Dilulio v. Board of Fire and Police Commissioners,* 682 F.2d 666 (7th Cir. 1982), also cited by Petitioner, merely reiterates that holding. There the court stated that the constitutional validity of a government employment regulation does not depend "on the availability of other employment selection procedures that would have a less discriminatory impact." In the due process context, the court remarked that there is no basis for courts to inquire whether a particular policy "is most efficacious." *Id.* at 671. The court also stated that plaintiffs could not prevail "by relying on allegations contained in their complaint or on affidavits that merely state a conclusory allegation, as did the affidavit of the plaintiffs' counsel." *Id.* **In the present case, Kurtz sought summary judgment yet did not even submit an affidavit, conclusory or otherwise, challenging the City's evidence of rationality, and in fact stipulated that all of the City's evidence was undisputed.**

[15] The court in *Grusendorf* stated that the "proof" of the rationality of the city's policy was the warning label printed on the side of all cigarette packages sold in America. 816 F.2d at 543. It is fallacious for Kurtz to attempt to distinguish *Grusendorf* on the theory that while a rational relationship may exist between "anti-tobacco" policies and firemen like Grusendorf,

All of the other cases cited by Kurtz are completely irrelevant.[16]

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no such rational relationship exists between such policies and secretaries like Kurtz. The Oklahoma City policy was justified by the same relationship between tobacco-use and employee health costs: In *Grusendorf* the city sought to reduce Workers' Compensation benefits paid to employees seeking compensation for smoke-related illnesses caused by deliberate smoke inhalation, and that goal of not wasting tax dollars due to self-inflicted employee illness is the **same goal** which justifies the policy *sub judice*.

[16] *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), held that the First Amendment bars governments from using the patronage system to violate associational rights; *Perry v. Sindermann*, 408 U.S. 593 (1972), held that states cannot refuse to rehire employees because they exercised their First Amendment rights; *Reed v. Reed*, 401 U.S. 71 (1971), involved a state law which irrationally gave preference to the male survivors of a decedent for estate administration purposes; *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), was a First Amendment case involving laws targeting seditious college teachers; *Watson v. City of Memphis*, 373 U.S. 526 (1963), was a desegregation decision; *Konigsbergg v. State Bar of California*, 366 U.S. 36 (1961), involved fundamental First Amendment rights of free speech and association; *Shelton v. Tucker*, 364 U.S. 479 (1960), involved First Amendment rights of free speech, association and religion; *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), held invidious the exclusion from the practice of law of youthful Socialists and supporters of loyalists in the Spanish Civil War; *DeWeese v. Town of Palm Beach*, 812 F.2d 1365 (11th Cir. 1987), struck down an ordinance against "shirtless jogging" because the town did not have a legitimate governmental interest or a rational basis for the ordinance; *Lidell v. State*, 731 F.2d 1294 (8th Cir. 1984), held that governments could not manipulate their budgets to avoid desegregation; and *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir. 1975), and *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972). both held that – despite this

Thus all of the relevant cases cited by Kurtz actually confirm the constitutionality of the policy *sub judice*, as do the many other relevant Supreme Court decisions which Kurtz does **not** cite because they confirm that cities certainly are **not** required by the Fourteenth Amendment to employ tobacco-users if they have a rational basis for wishing not to do so. *See e.g., Waters v. Churchill,* 115 S. Ct. 49 (1994) (affirming government's right to restrict even **fundamental** liberty interests when it is acting as an employer rather than acting as sovereign); *Flemming v. Nester,* 363 U.S. 603, 611-612 (1990); *Bowers v. Hardwick,* 478 U.S. 186 (1986); *Kodel v. Indiana,* 452 U.S. 314 (1981) (holding that it is the plaintiff's burden to prove that a challenged regulation is unrelated to the achievement of **any legitimate purposes**); *City of New Orleans v. Dukes,* 427 U.S. 297 (1975); *Weinberger v. Salfi,* 422 U.S. 749 (1975) (affirming that "prophylactic" policy presumptions, even when irrebuttable, are not irrational); *Graham v. Richardson,* 403 U.S. 365, 375 (1971) (confirming that suspect classifications are those which discriminate on the basis of race, nationality, or alienage); *Dandridge v. Williams,* 397 U.S. 471 (1970); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (reducing government expenditures is a legitimate governmental goal); *Ferguson v. Skrupa,* 372 U.S. 726 (1963); *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.,* 335 U.S. 525 (1949); *United States v. Carolene Products Co.,* 304 U.S. 144 (1938) ("Where the legislative judgment is called in question [the inquiry] must be restricted to the issue whether any state of facts either

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Court's ruling in *Kelly* – "tonsorial styles" are not a rational basis for excluding adult students or firing college professors.

known or which could be reasonably assumed, afford support for [the legislation]"); *Austin v. Tennessee*, 179 U.S. 343 (1900) (holding it within the province of government to prohibit the sale of cigarettes altogether, and remarking that the Court would be "shutting our eyes to what is constantly passing before them" [*id.* at 348] not to recognize the deleterious effects of cigarettes). *See also Webster v. Reproductive Health Services, Inc.*, 492 U.S. 490 (1989) and *Harris v. McRae*, 448 U.S. 297 at 313-318 (1980), holding that government is not required to subsidize or support private conduct, even when fundamental rights are involved, and is entitled to express value-judgments in the distribution of public funds and benefits.[17]

In *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979), the City Transit Authority refused to hire anyone, for **any position**, if they used methadone, a lawful drug. This Court held that the government need not substitute individualized "fitness" examinations for an across-the-board policy of exclusion (*id.* at 590-591), and rejected the "Due Process/Irrebuttable Presumption" argument – the same advanced by Kurtz – as having "no merit." This Court sustained the policy on the basis of evidence of

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[17] *Also see Picou v. Gillum*, 874 F.2d 1519 (11th Cir. 1989), affirming a law requiring motorcyclists to wear helmets because the costs of highway injuries are partly borne by the public; and *National Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124 (7th Cir. 1995), *cert. denied*, 115 S. Ct. 2579 (1995), affirming the constitutionality of Chicago's outright ban on spray paint because paints are not constitutionally protected and it is rational for governments to make the normal economic assumption that humans respond to incentives and disincentives imposed on their conduct.

"relevant differences" between methadone users and nonusers. *Id.* at 588. In the instant case the City proved through massive and **undisputed** evidence the substantial cost-and-productivity differences between tobacco users and nonusers.

Finally, Kurtz asserts that the City's policy "will open up virtually every aspect of a person's private life to intrusive governmental regulation in the supposed interest of cost-cutting." That is nonsense. First, the Florida Supreme Court specifically stated that its holding was limited to the narrow issue presented and was based on the special evidentiary circumstances in **this** case. Second, not **every** political and social controversy in American society needs to be – or ought to be – settled by the federal judiciary. As this Court stated in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985), when social or economic legislation is at issue, the Fourteenth Amendment allows the States wide latitude because the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.[18]

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[18] The specific issue of "smokers' rights" is properly being addressed by the States. *Compare* 1987 Mass. Acts 697 (barring state agencies from hiring smokers) and Fla. Stat., § 633.34(b) (1963) (barring certain Florida local governmental agencies from hiring smokers), with the "Smokers' Rights" laws – such as Or. Rev. Stat. § 659.380 (1991) and Va. Code Ann. § 15.1-29.18 (1989) – which have been adopted by roughly half the States to **prohibit** job discrimination based on use of tobacco. Garner, *Protecting Job Opportunities of Smokers*, 23 Seaton Hall L. Rev. 417, 422 (1993); Crumbly, et al., *Where They Smoke*, The Fla. Bar J. 108-111 at n.8 (Oct. 1994). Such "Smokers' Rights" statutes, banning discriminatory employment policies aimed at tobacco-users, have in fact twice passed the Florida Legislature: Florida

The issue of "smokers' rights" is a public policy (*political*) question for the state legislatures and Congress to address, not an excuse for the invention of a spurious new "civil right." See Garner, *supra*, at 430-43, commenting that tobacco-use does not present a constitutional question ("were tobacco-use to go the way of spitting on the streets, no one who cares about civil rights would mourn its passing"), and adding –

> If the deep suffering caused by 400,000 smoking deaths a year is ever going to be relieved, smoking must not receive the imprimatur of social approval accorded such activities as going to the church of one's choice. One of the very last things America needs is to see its hard earned public health gains derailed or compromised by dignifying smoking as a protected constitutional right.

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House Bill 1799 (1990) prohibited any employer from discriminating against employees because of off-duty use of tobacco, but that bill was vetoed by Republican Governor Martinez on July 3, 1990; Florida House Bill 1753 (S.B. 1238) (1992) also made it unlawful for employers to discriminate on the basis of off-duty use of tobacco, but that bill was vetoed by Democratic Governor Chiles on April 10, 1992. Similar bills were proposed in both 1993 and 1994 to move Florida into the column of states – apparently a slight majority – which prohibit "employment discrimination" based on tobacco use.

CONCLUSION

Dade County Circuit Judge Sidney Shapiro, the only judge who actually ruled on a federal question presented to him, correctly applied this Court's Fourteenth Amendment jurisprudence when he rejected Kurtz's challenge to the North Miami regulation. The *undisputed, unchallenged, unrebutted,* and *overwhelming* evidence proved that the City's policy is legitimate and rational in every respect, and Kurtz introduced not one scintilla of evidence to the contrary. The Florida district court decided *only* a state-law issue and certified *only* that issue to the Florida Supreme Court. The Florida Supreme Court decided *only* the state law issue briefed and argued by the parties. And finally, the Fourteenth Amendment permits the City to rationally decide not to hire tobacco-users as employees. The Court should deny Kurtz's Petition.

Respectfully submitted,

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No. 95-545

In The

Supreme Court of the United States

October Term, 1995

ARLENE KURTZ,

Petitioner,

vs.

CITY OF NORTH MIAMI, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari
From The Florida Supreme Court

APPENDIX TO THE BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

NOVEMBER 23, 1993

ARLENE KURTZ, Appellant,	**	
vs.	**	CASE NO. 92-2038
THE CITY OF NORTH MIAMI, FLORIDA, Appellee.	**	

Because the issue decided in this case is one of great public importance, we certify the following question to the Florida Supreme Court pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v):

> Does Article I, Section 23 of the Florida Constitution prohibit a municipality from requiring job applicants to refrain from using tobacco or tobacco products for one year before applying for, and as a condition for being considered for employment, even where the use of tobacco is not related to job function in the position sought by the applicant?

Hubbart, Jorgenson and Cope, JJ., concur.

A True Copy

* * *

THE SUPREME COURT OF FLORIDA

CASE NO.: 82,836

THE CITY OF NORTH MIAMI, FLORIDA,

Petitioner,

vs.

ARLENE KURTZ,

Respondent.

/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT

Case No. 92-2038

PETITIONER'S INITIAL BRIEF ON THE MERITS

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Feldman 1 Savings from Smoker Attrition (Weiss)

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Feldman 3 Savings from Smoker Attrition (Kristein)

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APPENDIX G Table of Contents for Petitioner's Composite Trial Exhibits "I" through "IV"

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The Third District certified the following question:

> Does Article 1, Section 23 of the Florida Constitution prohibit a municipality from requiring job applicants to refrain from using tobacco or tobacco products for one year before applying for, and as a condition for being considered for employment, even where the use of tobacco is not related to job function in the position sought by the applicant?

(Nov. 23, 1993 Certification Order).

Because the real issue in this case is whether the Privacy Amendment requires the public to use tax dollars to subsidize the cost of private conduct which is job-related, a better phrasing of the issue is:

> Does the Florida Privacy Amendment forbid communities from taking into consideration, in making public-employment decisions, the financial and productivity costs of smoking, and so compel them to continue using public money to subsidize the costs of smoking and thus contribute to the nation's worst public-health crisis?

NOTE ON REFERENCES IN BRIEF

Citations to the Record will be identified as "R. ___" and transcript citations by date and page ("July 8, 1991 TT. ___"). Accompanying this brief is an Appendix which will be referred to as "App. Exh. ___".

* * *

(The Full Version)

Plaintiff's lawsuit: ARLENE KURTZ's suit alleged that the challenged City regulation (App. Exh. "C") of not hiring any more smokers violated her constitutional rights under the Fourteenth Amendment and the Florida Privacy Amendment. (R.2-7).[2] The City by summary judgment motion and memoranda asserted that there was no State or Federal constitutional right which guaranteed a government job to tobacco users; that the relative wisdom or efficacy of its regulation was not the issue for adjudication; and that the City's regulation should be sustained because the City's policy was perfectly legitimate and rational.[3]

By introducing multiple volumes of empirical evidence which supported its regulation, the City demonstrated that the regulation promoted vital public objectives. (R. 179-2369, 2413-2419). The City's evidence conclusively demonstrated that workers who smoke are much more often ill and have much higher medical

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[2] Ms. KURTZ did not ask for damages, back pay, or a court order directing the City to employ her or even to re-interview her. (R. 2-7). Ms. KURTZ's attorney so stipulated during Ms. KURTZ's deposition (R. 2371-2412) at pp. 4-5, and at the summary judgment hearing of Nov. 25, 1991.

[3] Ms. KURTZ's attorney acknowledged that the City's policy satisfied the "rational basis" test (July 8, 1991 TT. 7, 8, 9, 13), in that the City's objectives were legitimate and the means used were rational. July 8, 1991 TT. 6, 15; see also Kurtz Motion for Judgment on the Pleadings (R. 74). Ms. KURTZ's attorney conceded that the City's policy would promote the City's legitimate objectives because smokers as a group did have higher medical costs than nonsmokers. July 8, 1991 TT. 11.

expenses and rates of absenteeism (irrespective of particular "job function"), and that the reduction of the number of smoking employees will substantially reduce the City's medical costs and improve productivity.[4] Through its *undisputed* evidence the City also proved the following salient facts:

– As former HEW director Dr. Lewis Sullivan once remarked, **"cigarettes are the only legal product that when used as intended cause death."** (New York Times, Feb. 2, 1991, at A-18). Tens of thousands of scientific

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[4] The City's evidence demonstrated that smoking constitutes the single greatest public health menace in the United States, and one which the Federal Government has *officially urged* all public institutions to combat. See 1989 Surgeon General's 689-page Report, *Reducing the Consequences of Smoking;* Covering transmittal letter to the President (Petitioner's Comp. Exh. IV, parts I and II). Only a few weeks ago eight past and present Surgeons General, from the Eisenhower through the Clinton Administrations, met in Washington to again appeal for public institutions to discourage smoking, stating that the nation "remains in tobacco's death grip." (New York Times, Jan. 12, 1994 at C-12). See *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525 (1949); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), for the proposition that courts are to accept all reasonable justifications for government policies even when they are hypothetical (which in this case they are not). In a decision which has often been cited by this Court, the Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), held that social and economic legislation is to be upheld if any state of facts, including assumed facts, would support the legislation, and that the existence of supporting facts "is to be presumed." *See, e.g., H.R.S. v. West*, 378 So. 2d 1220, 1225 (Fla. 1979); *Cilento v. Florida*, 377 So. 2d 663, 665 (Fla. 1979); *Hamilton v. Florida*, 366 So. 2d 8, 11 (Fla. 1978); *State v. Bales*, 343 So. 2d 9 (Fla. 1977).

studies have confirmed the cause-and-effect relationship between tobacco use and a multitude of deadly illnesses.[5] As one former Surgeon General stated, "smoking represents the most extensively documented cause of disease ever investigated in the history of biomedical research." Thousands of scientific studies have proved beyond contradiction that smoking is the leading and most avoidable cause of illness and death in our society. (*1990 Report of the Surgeon General,* "The Health Benefits of Smoking Cessation," Centers for Disease Control (1990), at page x.)[6]

– Smoking not only causes lung cancer, emphysema, and other obstructive illnesses of the lungs as well as cancer of the mouth, throat and larynx, but also coronary artery disease and heart disease (the **leading** causes of

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[5] Vogt & Schweitzer, 22 Amer. J. of Epidemiology 1060, 1066 (1985) report that 30,000-to-40,000 research studies have proven the basic empirical facts which underlie the City's policy. The accompanying Appendix contains *some* of the affidavits and other materials submitted by the City. However, space constraints prevent the City from including or even summarizing most of the evidence contained in the six volumes of exhibits which it submitted. (The index to the City's evidence is contained in the Appendix as Exhibit "G".)

[6] See the *1990 Surgeon General Report* ("Executive Summary") at p. x (contained in Composite Exh. IV, Parts I & II, of the City's summary judgment exhibits). The City is entitled to rely on that evidence in adopting its regulations and policies. *Renton v. Playtime Theaters,* 475 U.S. 41, 106 S.Ct. 925 (1986). See also *Grusendorf v. City of Oklahoma City,* 816 F.2d 539 (10th Cir. 1987), where the Court sustained a far more draconian "no-smokers" regulation on the basis of nothing more than the warning label which by Federal law must be printed on the side of every package of cigarettes sold in the United States.

death in the United States); compared with non-smokers, smokers have twice the risk of stroke, by itself the third leading cause of death in the United States. The mortality rate from abdominal aortic aneurism is two to five times higher in smokers than in non-smokers; smoking is a major cause of peripheral artery occlusive disease, including gangrene and loss of limbs; cigarette smoking substantially increases the risk of respiratory infections such as influenza, pneumonia, and bronchitis, which themselves constitute the sixth leading cause of death in the United States. Smoking also causes gastric ulcers and increases the risk of cancer of the pancreas and bladder. *1990 Report of the Surgeon General* "Executive Summary," at xi. Each of these myriad illnesses is a major cause of worker-absenteeism. The scientific evidence of the cause and effect relationship between smoking and these and myriad other illnesses and diseases (most recently even leukemia and cataracts have been added to the list) is overwhelming. Indeed, the evidence of the causal relationship between smoking and illness was even acknowledged by the Florida legislature 15 years ago. (*See* §381.3712, *Fla. Stat.* (1979), acknowledging smoking as a causal factor in many types of cancers).[7]

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[7] Benzene is a carcinogenic agent highly restricted by Federal law. A couple of years ago Perrier water was banned from distribution in the United States and actually pulled from store shelves because of Benzene readings of 16 parts per billion. According to the *1986 Surgeon General's Report*, cigarettes contain between 11,000 and 43,000 parts per billion of Benzene, 2,000 times more than the "dangerously polluted" Perrier water, yet are sold daily for a private profit. In fact, cigarettes contain over 43 carcinogenic chemicals according to the *1989 Surgeon General's Report*.

– Although one might not realize it from reading the daily newspapers, ***smoking actually causes more deaths than ALL crime, automobile accidents, fires, AIDS, cocaine, heroin, alcohol and suicides put together.*** (258 J. of Amer. Med. Ass'n (JAMA) at 2080 (1987)). Smoking is now killing approximately 420,000 Americans each year, or an American death rate equal to eight, eight-year Vietnam wars every year. Thus former Surgeon General Koop rightly stated in his 1982 report that smoking is the **"most important public health issue of our time."**[8]

– In narrow economic terms, the national cost of smoking-caused illness is 50 billion dollars; the State of Florida wastes approximately *two billion dollars* and 204,000 years of lost human life, each and every year on smoking illnesses. See *Smoking & Health, A National Status Report*, A Report to Congress (2d Ed. 1990), contained in Petitioner's Comp. Exh. I. In other words, if Floridians could be induced to quit smoking, the resulting savings would pay for all of the needed improvements to our

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[8] In an average group of 100 young smokers, one will lose their life due to murder, two to automobile accidents, and 25 to the effects of smoking. (*The Health Consequences of Smoking: Nicotine Addiction*, 1988 Report of the Surgeon General, U.S. Department of Health and Human Services). See Shultz affidavit (App. Exh. "E") at pp. 15-16. While the Third District found unimpressive the City's immediate interest in saving millions of dollars in public tax revenues by reducing the number of smokers in its work force, it totally ignored the broader and more compelling reason for the policy, namely that public institutions must stop subsidizing and "coddling" tobacco use, especially by their own public employees, if the United States is **ever** to deal with the nation's most serious public health crisis and stop 420,000 needless American deaths every year.

schools and the entire criminal justice system, with enough left over to modernize the entire court system. Equivalent improvements to public services would accrue on the local level (police; services for youth and the elderly; housing for the homeless; treatment for the mentally ill, etc.), to the extent that local communities finally take seriously the urgent pleas of all Surgeons General since the 1960's that **government begin to implement disincentives to discourage smoking rather than continuing to subsidize and coddle such suicidal behavior.**

– The direct economic costs of smoking are exceedingly high for the smoker's employer as well. According to the NADL Journal (January-February 1983), pp. 28-29, smoking costs American employers over **27 billion dollars** ($27,000,000,000) per year in extra absenteeism and health care costs. Men under 45 who smoke two packs of cigarettes a day face more than $56,000 of additional medical costs and most of that extra cost is borne by their insurers **which in this case are the people of North Miami.** G. Oster, *et al.*, The Economic Costs of Smoking and Benefits of Quitting, 4 (1984), at xvii. Each smoking employee costs the City taxpayers as much as $4,500 extra per year, year-in and year-out (a fact which is proven and undisputed in this litigation). Daynard, *Smoke Gets in Your Bottom Line*, 5 Boston J. 3 (1985).[9]

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[9] Weis, *Profits Up In Smoke*, Indiana Bus. J. 18-19 (1981) summarizes various studies and concludes that $3,195-to-$4,500 per year was the average additional cost of employing a smoker. Weis, supra, *Can You Afford to Hire Smokers?* The actual cost may be slightly higher: *see* Management World, Sept. 1981, pp. 39-40 (stating that each new smoking employee costs an employer $4,789 per year in additional expenses); 60[3] Personnel J.

All of these facts were established by the City and were never contradicted by Ms. KURTZ.

Accompanying the City's Motion for Summary Judgment was the detailed, 30-page affidavit of Dr. James Shultz of the Department of Epidemiology and Public Health, University of Miami School of Medicine. (App. Exh. "E"). Dr. Shultz is a nationally-recognized expert in

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162-165 Mar. 3, 1981). *See also* Gabel, et al., *Smoking Policies*, 83(1) Southern Med. J. 17 (1990). After a seven-year study of the medical requirements of smokers and nonsmokers, it was found that smokers spent, on average, 17 days more in the hospital. 22[6] Am. J. of Epidemiology 1060-1066 (1985). An even more recent study by a group of hospitals, covering 10 states, found that smokers' insurance claims were 24% higher on average than for nonsmokers. Wall St. J., Mar. 6, 1990, at B1. Health and disability insurers like Blue Cross report that claims for smokers run as high as 28% more than for nonsmokers. (*1989 Surgeon General's Report*, at Table 17, p. 549. To the same effect, see Milliman & Robertson, Health Risks and Behavior (1987), finding that smokers are 29% more likely to have large (over $5,000) annual insurance claims and to require far more days of hospitalization.

After reviewing the extensive scientific literature, the Kristein study concluded that "Smokers have 33%-to-45% excessive absenteeism." Kristein, 12 Preventative Medicine 358, 366 (1983) (contained in Petitioner's Comp. Exh. I). There are other "hidden" costs of having smoking workers: Fires are accidentally set, and City automobiles and equipment damaged by surreptitious smokers. Indeed, smokers even cost more money in terms of accidental injury and related workers' compensation costs due to accidents caused by eye inflammation and hand interference. Gabel, *et al.*, *Smoking Policies*, 83(1) Southern Med. J. at p. 9 (1990), reporting that smokers have more automobile accidents and moving violations; Lippiatt, 19 Preventive Med. 515 (1990), reports that cigarette-fires annually cause 8,500 deaths and injuries and half a billion dollars in property losses.

the field of behavioral epidemiology, the study of the patterns of human disease, and his research specialty is the health effects of cigarette smoking. Basing his conclusions on nearly **100 national scientific studies,** Dr. Shultz stated that the additional cost to North Miami of each smoking employee is as high as $4,611 (1981 dollars) per year. Those costs include increased absenteeism and early mortality, increased non-health insurance costs, and job time lost. (App. Exh. "E") Dr. Shultz also confirmed the scientific basis for the City's one-year cessation requirement, based on the empirical evidence regarding the addictive qualities of smoking and relapse rates over various periods of time. (*Id.*).

Approximately 17% of the City of North Miami workforce now smokes. The City is fully self-insured with respect to employee medical costs and pays 100% of its workers' medical expenses from taxes in the general fund. See Lee R. Feldman depo. (App. Exh. "F") at pp. 47-50; Adele Hartstein affidavit (App. Exh. "D"). Even using the **most conservative** figures cited by Dr. Shultz, the City spends hundreds of thousands of extra dollars **each year** in additional medical costs plus lost productivity due to smoking workers. Assuming normal turnover and retirement, the City will thus **unquestionably** save millions of dollars if it stops hiring smoking employees.[10] Those savings can now be used to pay for

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[10] See Affidavit of Deputy City Manager Lee R. Feldman (App. Exh. "F") which contained projections of future savings to the City based on the various national studies cited in Dr. Shultz's affidavit. Mr. Feldman projected total cumulative savings to the City as high as 14 million dollars over the next 20 years. The City submitted over 50 scientific studies and reports which supported Mr. Feldman's projections.

hot meals and medical transportation for the elderly, housing and care for the homeless, additional police protection, or other major programs. The City will save not only in medical costs: In an average group of 100 smoking employees, 25 will die from smoking: each such employee's death will be slow and agonizing, costing the City tens of thousands of dollars in direct medical, hospital and drug expenses, and each death will result in jobs remaining unperformed for months and then filled with inexperienced workers who require special training and are less efficient and productive in their labor.

As of 1991, 60.9% of American cities have revenues which are exceeded by expenditures, and 87.2% of those cities attributed their negative balance sheets to the rising cost of employee health benefits. (Chicago Tribune, July 9, 1991, at 11, reporting study by National League of Cities.) **The rising cost of health care is now widely considered the single most compelling economic problem in the United States, and tobacco has played a dominant role in creating that crisis.**[11]

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[11] *"I think we are spending a ton of money in private insurance and government tax payments to deal with the health-care problems occasioned by bad health habits, and particularly smoking."*

President Bill Clinton
February 25, 1993

As the January 1994 meeting of the seven former Surgeons General, they noted that more than **two million Americans** have been killed by the tobacco industry since the first Surgeon General's report on smoking in 1964, yet "the most lethal and addictive product in our society" continues to be pushed by the tobacco industry which has a "political stranglehold" on most governmental agencies. (New York Times, Jan. 12, 1994 at c-12; Dallas Morning News, Jan. 12, 1994 at 6-A).

As reflected by the data summarized above and as confirmed by the National Institutes of Health in its October 1989 Report, *Guide to Public Health Practice* (at p. ix), tobacco use in all its forms is thus having "**a debilitating and devastating effect on the health of the American people.**" Yet in 1985 alone, the American cigarette manufacturers who are behind this litigation (and would be the sole beneficiaries of a decision in favor of the nominal Plaintiff KURTZ), enjoyed **domestic** annual retail sales of approximately 30.2 billion dollars ($30,200,000,000), selling **600 billion** cigarettes each year in the United States alone. *Smoking Related Deaths and Financial Costs,* U.S. Office of Technology Assessment (1985), at p. 6; *Smoking, Tobacco & Health, a Fact Book,* U.S. Public Health Service (1989) (contained in Petitioner's Comp. Exh. II). Even the merchants of tobacco death have grudgingly come to accept that public and private employers can ban "on-duty" smoking and such restrictions are commonplace. (By state law, smoking is already illegal in public facilities in Florida, except for a few designated areas.) The reason the industry accepts on-duty restrictions is that **they do not decrease tobacco consumption and sales, and so, *ipso facto*, they do not reduce illness either.** On the contrary, when "on-duty" smoking is banned, the main consequence is lower productivity, not less illness **or** higher productivity. Smokers must ingest nicotine, typically every 30-45 minutes, and their need for a "fix" is as strong as that of a heroin addict.[12] When employers merely ban smoking on duty,

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[12] The *1988 Surgeon General's Report* equalizes nicotine and heroin in terms of their addictive properties, state that

> The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that

addicted employees invariably find ways of satisfying their habit through five-to-ten minutes "disappearances" typically twice-an-hour. Thus researchers have concluded that heavy smokers "**are absent from work almost twice as often as their peers.**" Weis, *Can You Afford to Hire Smokers?* Personnel Admin. 72 (May 1981).

The City also proved that its regulation was neither unprecedented nor draconian; that thousands of federal, state and local regulations, ordinances, statutes, and employment policies (including 600 state laws) restrict

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determine addiction to drugs such as heroin and cocaine. (1988 *Surgeon General's Report, supra,* at 9).

The U.S. Centers for Disease Control reported in *Morbidity and Mortality Report,* 39 MMWR 38 (Sept. 28, 1990), at pp. 673 *et seq.,* (contained in Petitioner's Comp. Exh. I), that a Colorado state hospital's ban on workplace smoking resulted in a small reduction in the number of cigarettes smoked at work, offset by increased smoking after work. Thus such bans do not significantly improve the health of workers, and so do not significantly reduce their rate of illness, absenteeism, or medical and insurance expenses.

Moreover, since 1969 it has been established that maternal smoking leads to infant low birth rate and an increased incidence of prematurity, spontaneous abortion, still birth, and neonatal death. *1989 Surgeon General's Report,* at 8; *The Health Consequences of Smoking: 1969 Supplement to the 1967 Public Health Service Review,* U.S. Public Health Service (1969). By 1975 the Surgeon General had linked parental smoking to bronchitis and pneumonia in children. *1989 Surgeon General's Report,* at 9; *The Health Consequences of Smoking,* U.S. Dept. of Health, Education and Welfare (1975). The City's self-insurance of City employees and their family members means that merely barring "on duty" smoking does not protect family members from such illnesses for which the City has to pay.

and regulate the sale, consumption, use, distribution, possession, and advertising of tobacco products. Indeed, in late 1987 the State of Massachusetts adopted a statute barring certain public agencies from hiring smokers, **and even dictating the newly hired employees who later become smokers must be terminated.** (1987 *Illegible Acts* 697). Likewise in *Grusendorf, supra,* 816 F.2d 539 (the only prior case dealing with a claim of "smoking as a civil right"), the Court sustained the constitutionality of a city employment regulation banning even **off-duty** smoking by **already-employed municipal workers.** The City also noted that Florida law already *barred* local governments from employing any firefighter who had smoked within a year of applying. (§ 633.34(b) *Fla. Stat.* (1990)). The City also provided an historical synopsis of smoking regulations, noting that until early in this century as many as **12 states banned the import or sale of cigarettes entirely.** (See Smithsonian, July 1989, at p. 107).

The testimony and affidavits and exhibits submitted by the City in support of its regulation were **overwhelming** and **uncontradicted**: Plaintiff submitted no evidence whatever to demonstrate that the City was not confronting the most compelling of medical, social and fiscal problems, nor did the Plaintiff rebut the City's evidence that its policy would in fact realize significant savings and achieve greater worker productivity and reduced absenteeism by reducing through attrition the number of its employees who smoke.[13]

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[13] In fact, Ms. KURTZ's attorney had no interest whatever in the evidence during the entire trial court proceedings, evidence which she actually characterized as "irrelevant." See Jan.

The summary judgment bearings and ruling: At the summary judgment hearings before Judge Shapiro, Ms. KURTZ's attorney conceded that it was her burden to establish – apparently without evidence – that the challenged regulation was not rationally related to a legitimate government goal. (Nov. 25, 1991 TT. 5; Jan. 7, 1992 TT. 20, 21, 24). Her only argument against the City's regulation was to insist that there were more effective ways of addressing the problem. (*Id.* at 24-29).

The Third District's opinion portrays the issue as one of "informational privacy," focusing on the City's requirement that Ms. KURTZ **disclose** whether she was or was not a tobacco user, which the court described as "intimate" and "private and personal information." **But no such claim was argued by Ms. KURTZ below.** Precisely because Ms. KURTZ's complaint was rather vague about the exact nature of her legal and constitutional claim, she was deposed prior to the summary judgment hearing so the City could ascertain the exact nature of her claims, and Ms. KURTZ provided the following testimony:

By Mr. Echarte (counsel for the City):

Q: Do you smoke?

A: Yes.

. . . .

7, 1992 TT. 23: "As to the . . . factual issue . . . the information that has been provided in support of . . . the defendant's motion for summary judgment **is really irrelevant.**" At the end of the final hearing, the court specifically inquired of Plaintiff's attorney whether there were any facts in dispute so as to prevent a summary judgment, and she stated that there were no material facts in dispute. (Jan. 7, 1992 TT. at 46).

Q: Now, when I initially came out into the lobby you were having a cigarette. Is that correct?

A: Yes.

Q: Miss Kurtz, would it be fair to say that you smoke in public?

A: Yes.

Q: Do you consider smoking to be secret conduct that you engage in?

A: No.

Q: Do you consider the fact that you smoke to be a personal secret?

A: No.

(Kurtz depo. at p. 9; R. 2371).

Judge Shapiro entered his final summary judgment on August 21, 1992, sustaining the City's policy in all respects. Judge Shapiro held that Ms. KURTZ did not have a constitutional right to be employed by the City, and that the right to use tobacco is not a fundamental privacy or liberty right. The court rejected Plaintiff's equal protection attack, noting that the Fourteenth Amendment did not require a government to choose between attacking every aspect of a problem or not attacking the problem at all, and so Plaintiff's argument that the City did not exclude "Twinkie eaters" (or skydivers, overweight individuals, etc.) was irrelevant, because "[a] governmental entity is not bound to deal

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alike with all classes or to strike at all evils at the same time or in the same manner."[14]

The Third District decision: All of Judge Shapiro's findings and legal conclusions were sustained by the Third District, except on the Florida Privacy Amendment issue. As became quite clear at oral argument, the Third District understood that the **actual** policy at issue in the case was perfectly reasonable and that it made no sense to speak of smoking as a "constitutional privacy right" or of smokers as a constitutionally protected class, and that there was no such thing as a smoker's "privacy right" to a government job. What disturbed the court, however, was the prospect that this policy might lead to bizarre future policies aimed at beer drinkers or bacon or Twinkie eaters.[15] To reach its goal of locking shut the

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[14] App. Exh. "B." Judge Shapiro found that the City's employment policy had been promulgated to increase productivity, to reduce absenteeism, and to reduce the City's costs (all of which were undisputed); and that the regulation was based on proper evidence that smoking employees increased the cost of the City's insurance program which was funded by the City's taxpayers. The court found that the objectives achieved by the City regulation (including raising worker productivity) were proper governmental objectives. Judge Shapiro confirmed what Ms. KURTZ's attorney had already stipulated, that Plaintiff had the burden to show that there was no rational relationship between the City's regulation and any legitimate governmental objective; Judge Shapiro found that Plaintiff had failed to carry her burden of proof, and that the evidence presented by the City demonstrated that the government was seeking to achieve proper objectives and was using a proper method of achieving its objectives.

[15] The court's "floodgates" hypothesis is revealed in the opinion itself, where the court wrote that he City's policy might

floodgates against any such "trend," the district court repackaged Ms. KURTZ's actual claim – of a smoker's constitutional right to equal public employment – into one of "informational privacy" arising from the government's inquiry into so-called "sensitive personal information." Thus the Third District analogized the case to those involving the "disclosure of private information" through the use of pen registers, the disclosure of blood donor "confidential information," and the privacy of bank records and psychological/medical records; cases involving "the power to control what we shall reveal about our intimate selves." (Op. pp. 5-6). However, in deciding the case on that basis, the court was compelled to ignore the fact **that no such "informational privacy" claim has ever been upheld by a Florida court and that Ms. KURTZ had actually *disclaimed* any such "information privacy" interest in this case!**

SUMMARY OF ARGUMENT

The City is not directing Ms. KURTZ not to smoke, publicly or privately, and is not doing anything to stop such behavior. If Ms. Kurtz wishes to make the private, autonomous decision to smoke herself to death, that remains entirely her private decision. The Florida Privacy Amendment does not **compel the public to pick up the tab for that private decision.** The Third District has confused private rights with public coddling, and has also confused civil *rights* (equal protection) with civil *liberties*

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be followed by regulations aimed at practices "such as drinking, eating, exercising and engaging in certain sexual practices." (Op. at p. 3).

(privacy). The district court's decision is also irreconcilable with **every Privacy Amendment case which has ever been decided by a Florida court.**

I

THE THIRD DISTRICT'S RULING IS WRONG AS A MATTER OF *STARE DECISIS:* THE RULING CONSTITUTES "AD HOC JURISPRUDENCE" AT ITS MOST ARBITRARY BECAUSE IT IS IRRECONCILABLE WITH ALL OTHER PRIVACY AMENDMENT DECISIONS.

As this Court is aware, the Florida Privacy Amendment has until now been given significant positive meaning only in the context of "right-to-die" and abortion where the government is seeking to compel or forbid some medical procedure on a live human body. Thus the Third District was unable to cite a single Florida privacy case which offers precedential support for its ruling. All the Third District could cite in the way of "authority" was a 1978 law review article by then-private attorney Cope (later one of the judges who decided *Kurtz* below), who was writing as an **advocate** with respect to the then-proposed Privacy Amendment.[16]

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[16] In a prior privacy decision, this Court felt compelled to comment that the legitimacy of the courts was jeopardized when a judge acted as advocate and thereby jeopardized the "pretense of impartiality." *In Re T.W.*, 551 So. 2d 1186, 1190 (n.3) (Fla. 1989). For an appellate court panel to cite as its only "authority" the writings of a panel member **as a private advocate** before being appointed to the court also deprives the court of the pretense of impartiality.

App. 23

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82-836

THE CITY OF NORTH MIAMI, FLORIDA,

Petitioner,

v.

ARLENE KURTZ,

Respondent.

On Petition For Discretionary Review
Of An Order Of The Third District
Court Of Appeal of Florida
Case No. 92-2038

ANSWER BRIEF OF RESPONDENT

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II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Does Article I, Section 23 of the Florida Constitution prohibit a municipality from requiring job applicants to refrain from using tobacco or tobacco products for one year before applying for, and as a condition for being considered for, employment, even where the use of tobacco is not related to job function in the position sought by the applicant?

The petitioner City of North Miami (hereinafter "the City") suggests that, despite the Third District Court of Appeal's certification of the above question, the issue is actually one of whether a government employer should be compelled to "subsidize" the costs of smoking. This suggestion mischaracterizes the factual and legal issues in this case. The fact that an employee may use part of his or her wages to buy a carton of cigarettes does not mean that the employer is "subsidizing" that employee's smoking, anymore than the employer is "subsidizing" the

employee's purchase of clothing, food or shelter. The City would like to characterize a paycheck as a subsidy of its employees' personal activities, however, in order to justify controlling the private lives of its employees and prospective employees by refusing to "subsidize," i.e., to pay a paycheck to, those persons of whose private activities the City disapproves.

In fact, this case does not involve any claim of entitlement to a subsidy or any form of special treatment for smokers. Rather, this case is about whether certain City job applicants should be deprived of *equal* treatment on the basis of private, lawful, off-duty conduct such as smoking, where such conduct does not relate to the job functions of the position applied for. The Third District Court of Appeal has therefore properly and succinctly stated the question of great public importance involved in this case.

* * *

V. SUMMARY OF ARGUMENT

The Third District correctly ruled that Administrative Regulation 1-46 is unconstitutional under article I, section 23 of the Florida Constitution.

The decision whether or not to engage in lawful conduct, such as smoking, in one's own free time, is a matter of personal autonomy and privacy protected by article I, section 23, of the Florida Constitution. The City's Administrative Regulation 1-46 intrudes into the private lives of its employees and prospective employees, including Kurtz, by requiring all job applicants to refrain from

this lawful, private conduct for a year as a condition of applying for any City job, regardless of whether or not smoking is related to job functions or performance. In order to justify such an intrusion, the City would have to demonstrate that the regulation serves a compelling governmental interest, and that the regulation is the least intrusive means of achieving that goal.

The City's asserted interest in reducing its smoking-related medical and productivity costs cannot be deemed compelling where most or all of these costs are associated with on-the-job smoking, not with the pre-hiring and off-duty smoking prohibited by Administrative Regulation 1-46. Even if the City could establish a compelling interest in reducing such costs, its regulation is not the least intrusive means of achieving this goal. Rather, because the regulation applies to all City job applicants, regardless of their qualifications and regardless of whether or not smoking is relevant to the functions of the job sought, Administrative Regulation 1-46 is the most intrusive means the City could use to obtain its asserted objective of reducing smoking-related costs.

Even if the Court were to hold that the City need not demonstrate a compelling interest to justify its no-smoking hiring regulation, Administrative Regulation 1-46 would still be violative of article I, section 23, because that regulation is not rationally related to any legitimate governmental interest of the City. The regulation is irrational as a means of achieving reductions in medical and productivity costs, because the regulation applies to all smokers, whether or not they are healthy, and whether or not they are qualified for, and perform satisfactorily at, any particular City job.

Regardless of whether the "compelling state interest" or "rational relationship" standard applies in this case, Administrative Regulation 1-46 is unconstitutional under article I, section 23 of the Florida Constitution.

VI. ARGUMENT

A. The City's regulation violates the privacy guarantee of the Florida Constitution, in that it constitutes governmental intrusion into private, off-duty conduct unrelated to *any* compelling interest of the City

The City's no-smoking hiring regulation constitutes governmental intrusion into the private lives of citizens for the purpose of regulating lawful, off-duty conduct unrelated to any compelling governmental interest. For citizens, such as the plaintiff, who refuse to submit to this indirect regulation, the penalty is a denial of all opportunity to seek or obtain employment in City government.

Kurtz has not asserted, as the City suggests, that she has a constitutional "right to smoke." Rather, she has a constitutionally protected right not to be subjected to the City's regulation of her private, off-duty life and lawful, off-duty conduct as a condition of seeking and obtaining the same government employment opportunities available to other citizens.

Article I, section 23, of the Florida Constitution provides, "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." This explicit constitutional right of privacy is far broader than that provided by the general due process language of the U.S.

Constitution. *In re T.W.*, 551 So.2d 1186, 1192 & n.5 (Fla. 1989); *Shaktman v. State*, 553 So.2d 148, 151 n.9 (Fla. 1989); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla. 1985). In cases involving violations of the privacy guarantee, the government has the burden of demonstrating a "compelling state

* * *

VII. CONCLUSION

On the basis of the arguments and authorities set forth above, the respondent requests that the question certified by the Third District Court of Appeals be answered in the affirmative, and that the decision of the Third District in this case be approved.

Respectfully submitted,

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THE SUPREME COURT OF FLORIDA

CASE NO.: 82,836

THE CITY OF NORTH MIAMI, FLORIDA,

Petitioner,

vs.

ARLENE KURTZ,

Respondent.

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT

Case No. 92-2038

PETITIONER'S REPLY BRIEF

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ARGUMENT

KURTZ's incessant commentary about the evidence succeeds in sidetracking the discussion away from the important issues and might actually mislead the Court about the factual basis for the City's policy. The following factual rebuttal thus becomes unavoidable:

A. It is too late for KURTZ to dispute the evidence at this state of the proceeding: The City submitted to Circuit Judge Shapiro volumes of medical, economic and scientific data, affidavits by public officials and Dr. SHULTZ (a national authority on smoking and health), and a great many other evidentiary materials all of which conclusively proved that its policy was justified by the empirical facts and advanced urgent public and governmental objectives consistent with officially-announced national health policy. KURTZ submitted **no** substantive evidence or testimony to rebut or contradict that showing because, she asserted, the case should be decided in an evidentiary vacuum, purely as a matter of abstract principle. KURTZ did not even depose Dr. SHULTZ about his data or findings; nor did she depose any of the witnesses identified by Mr. FELDMAN as the City's experts on such topics as the City's employment policies and hiring practices, and its insurance and medical expenses and procedures.[1]

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[1] Mr. FELDMAN in his deposition repeatedly informed KURTZ's attorney that many of her questions pertained to the data provided by Dr. SHULTZ, or to information possessed by the officials he specifically identified to be in charge of the City's insurance program, personnel department, department of administration, and smoking-cessation programs. See, e.g.,

KURTZ did not depose the principal witness in the case (Dr. SHULTZ) and did not submit **any** expert testimony or, indeed, **any** empirical evidence whatever to contradict or challenge the City's medical and economic data, and when she moved for summary judgment she advised Judge SHAPIRO that all of the evidence was **undisputed** and **irrelevant**. See Jan. 7, 1992 transcript at pp. 23, 46. Judge SHAPIRO correctly decided that the evidence was hardly "irrelevant," and his ruling thus contained specific findings of fact based on **undisputed evidence**, and not one of his findings was questioned or even mentioned by the Third District.

However uncomfortable it may be for her, KURTZ made her own bed and must now lie in it. It would be terribly unfair to the City for KURTZ to be permitted, two appellate courts removed from the evidentiary stage of the proceeding, to begin remaking her bed to generate "factual disputes" which did not exist in the trial court **when such factual disputes could have been dealt with and resolved.**[2]

FELDMAN depo. at 12-35, 39. **KURTZ deposed none of these witnesses**. In her brief KURTZ nevertheless denigrates FELDMAN's supposed lack of knowledge on these very same topics, i.e., the efficacy of the City's smoking cessation program (actually operated by Mr. LAPIRA; FELDMAN depo. at 29-31), and the City's health-screening procedures (operated by Mr. ZEIEN; FELDMAN depo. at 47-50). KURTZ likewise refers to the City's supposed policies concerning obese and diabetic candidates, even though Mr. FELDMAN stated that Mr. ZEIEN had that information, and that the City was barred by federal law from refusing to hire persons with those conditions (see FELDMAN depo. at 103-104).

[2] If KURTZ had disputed the City's evidence at the proper time, before the trier of fact, then FELDMAN or SHULTZ could

B. KURTZ's factual statements are false and/or misleading: KURTZ's brief contains dozens of "factual" statements none of which are strictly true and most of which are highly misleading. For example, at page 7 of her brief, KURTZ writes, citing pages 17-19 of the SHULTZ affidavit (emphasis in original):

> Significantly the experts stated that all of an employer's lost productivity costs related to employee smoking could be eliminated by a prohibition of on-the-job smoking.

This statement is doubly false for at that point in his affidavit Dr. SHULTZ was merely referring to the findings of one other researcher among the 90 which he cited (not to his own findings); and moreover the KURTZ

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have submitted supplemental testimony; or the City could have argued to the trier of fact what the testimony and evidence actually proved; or LAPIRA, ZEIEN and MEARS could have rebutted the misleading "factual statements" which now appear in KURTZ's Supreme Court brief. (As a matter of fact, the City initially made arrangements to obtain additional witnesses and evidence, including direct testimony from former Surgeon General Koop, but abandoned those efforts **because** KURTZ stipulated that she did not dispute the City's medical and economic data and findings.) Not only would it constitute the worst sort of "sand-bagging" for KURTZ to evade her stipulation that the evidence was undisputed, but it would also be **bizarre** to permit a plaintiff to argue her case at the evidentiary stage as a "pure theory" case, yet then in the Florida Supreme Court portray the case as an "evidentiary dispute" – that would literally reverse the proper order of things.

phrase "all of a employer's lost productivity costs" actually refers to only about $100 per year in costs attributable to on-the-job smoking which do not include **any** of the major costs of smoker illnesses and absenteeism.[3]

Another example is KURTZ's deliberate misconstruction of the term "subsidization." KURTZ heatedly asserts that it is no subsidy for an employee to use part of his wages to purchase cigarettes, but KURTZ knows full well that the City never suggested any such thing. The City said it was a subsidy for the public to have to pay **extra**

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[3] Dr. SHULTZ was thus reporting the virtual tautology that if an employer did not allow smoking employees to smoke on the job, then a small amount of money would be saved even if the employee continued to smoke off the job (i.e., because they would not burn up their offices), which is utterly different from saying (as KURTZ does in her brief) that prohibiting on-the-job smoking eliminates "all lost productivity costs" arising from the employment of smoking employees. (In fact, the City's undisputed financial projections reflect that even **that** study indicates that the City's policy will save at least $2.5 million.) The important point is that KURTZ's distortion of the term "lost productivity costs" was not inadvertent since it was carefully teased out of the tables contained in the SHULTZ affidavit.

Another example of KURTZ's distortion of the record is her statement that SHULTZ's affidavit was based on a comparison of "never smokers" and therefore did not support the City's policy which was geared to the "one-year non-smoking" of candidates. That is a distortion of the SHULTZ affidavit, which referred to a single study involving "never smokers" but based its findings on 90 studies listed at the end of his affidavit, and in fact, **specifically** addressed the significance of the "one-year period of successful cessation." (See SHULTZ affidavit at 22). Furthermore, the City's policy cannot be unconstitutional on the theory that the evidence would warrant a policy even more restrictive than the policy actually adopted!

dollars over and above wages for the expensive consequences of some of its employees' "off-duty" behavior.[4]

Another example is the canard that the City does not give smokers the option of waiving insurance or accepting a surcharge commensurate with their higher medical expenses and lower productivity. The record is undisputed that the City **cannot** implement such measures (because of collective-bargaining restrictions), and that it is a fundamental employment policy of the City that all its employees receive full medical insurance at no cost. (See, e.g., FELDMAN depo. at 35-37, 44-46, 67-68; HARTSTEIN depo. at 179). If KURTZ doubted that testimony

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[4] It is no subsidy for an employee to use her wages for private pleasures, but it is a subsidy to require the public to also pick up the tab for the consequential expenses of such private pleasures. That is precisely why the United States Supreme Court rejected the argument that constitutional privacy compelled the public to subsidize the costs of abortions for welfare recipients; not because the recipients were being prevented from using their public assistance monies for abortion, but rather because the public was not obligated to pay additional money for that service. That ruling, moreover, was in the context of an established constitutional right to purchase an abortion, while here there is no constitutional right to buy or use tobacco, a point which even KURTZ finally seems to concede at page 16 of her brief. (And the Court should note that Federal law actually **does** prohibit Food Stamp subsidies to be used for tobacco!) In other words, KURTZ would lose even if she demanded that the townspeople of North Miami pay her extra for the medical costs of an abortion, which **is** a constitutionally-protected behavior, so she certainly cannot demand that the townspeople pick up the tab for other medical costs **not even related** to a constitutionally-protected behavior. **That** is why the City maintains that this case is more like the "helmetless motorcycling" case *Picou*, 874 F.2d 159 (11th Cir. 1989), rather than any case involving a constitutionally-protected form of conduct.

and believed that such alternative measures were possible, she should have introduced testimony or evidence to support her skepticism.[5]

Another example is KURTZ's statement that the policy is inequitable because the City does not exclude persons with other conditions and habits, but the record is undisputed that the City does indeed screen the health of all applicants (FELDMAN depo. at 47-50); and KURTZ knows full well that Federal law precludes the City from declining to hire persons with the physical conditions she enumerates.[6]

Another distortion is KURTZ'S assertion that the City's policy allows it to accept "less qualified" nonsmokers over "more qualified" smokers. That begs an empirical question which is not at issue since the **undisputed** evidence is that a workforce of nonsmokers is by definition "more qualified" from the public's perspective than a workforce of smokers, since on average each

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[5] Likewise there is no evidence in the record to support KURTZ'S contention that potential job applicants are being forced to change their behavior as a result of the City's policy, rather than simply applying for other jobs.

[6] Moreover, KURTZ cannot be arguing that the City policy would be constitutional if only the City excluded skydivers or couch potatoes along with smokers, which is no privacy argument at all but rather an equal protection argument, and a specious one at that. Underinclusion has never been a basis for striking down a rational classification scheme, and if it were, then the Third District opinion would itself violate the Fourteenth Amendment because it grants absolute protection to users of a single plant substance without assuring equal protection to all other similarly-situated flora users who are affected by exclusionary hiring practices based on private practices far less injurious to the public interest than that of tobacco-users.

smoking worker costs the City roughly an extra $70,000 over 15 years. It is too late for KURTZ to retract her stipulation that the City's data was undisputed, and there is nothing in the record to support her speculation concerning the effect of the policy on applicant quality. Moreover, since KURTZ concedes that there are numerous qualified applicants for a particular job (brief at 11), the real question is: **IF KURTZ AND HER NON-SMOKING TWIN, IN EVERY OTHER RESPECT IDENTICAL TO HER, WERE BOTH TO APPLY FOR A JOB AT THE CITY, DOES THE FLORIDA CONSTITUTION ACTUALLY FORBID THE CITY FROM PREFERRING THE NON-SMOKING TWIN NO MATTER HOW OVERWHELMING THE EVIDENCE THAT THE NON-SMOKING TWIN WILL BE A MORE PRODUCTIVE PUBLIC SERVANT AND COST $70,000 OR $100,000 LESS TO EMPLOY?** Since KURTZ apparently would answer that question "Yes, it does," it is **she** who is advocating irrationality by the government!

Some of KURTZ's "factual statements" are preposterous, for example, her statement that the City's economic analysis "was not based on actual medical or productivity costs' experience," a comment which suggests that KURTZ is unfamiliar with even the most basic precepts of scientific and rational thought. If 30,000 studies confirmed that people who jump off high buildings do not sprout wings (as they have confirmed the medical and economic consequences of tobacco use), then both Mr. FELDMAN and Ms. KURTZ can rationally conclude they won't either, without leaping to their deaths for the "actual experience" of impacting the pavement. The evidence submitted to the circuit court, evidence which KURTZ stipulated was not disputed and which she

deemed "irrelevant" at that time, proved **conclusively** the medical and economic consequences of employing smokers.[7]

Another example of distortion is KURTZ's statement, repeated more than a half-dozen times, that an "on-duty" smoking ban would be equally effective without encroaching privacy rights. The testimony and evidence actually reflect that "on-duty" smoking bans are **ineffective** because smokers, being drug addicts, must then continually go "off-duty" for a fix and thereby further reduce productivity without improving their illness rates or medical expenses; some of that evidence was even cited in Petitioner's Initial Brief at pp. 12-13.[8]

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[7] Equally foolish is KURTZ's attack on FELDMAN's cost analysis because it assumed a four percent inflation rate (so what?), and was based on the findings of four alternative studies. KURTZ **did not introduce any evidence** contradicting any of those projections, and stipulated that **they were not disputed,** and even now she fails to explain what is wrong with offering a range of economic forecasts based on the leading empirical studies in the ~~field~~. But this is a "red herring" anyway since **even Ms. KURTZ and her attorney** conceded in the trial court **and the Third District** that smokers did have significantly higher illness rates and medical expenses, a fact which no sane person could dispute.

[8] Moreover, KURTZ has carefully avoided defining what she means by the term "on-duty smoking ban," which is no accident since it was KURTZ who argued below that the City's policy was preempted by the FCIAA, ch. 385, *Fla. Stat.* (1989) which barred local regulation of indoor smoking in public facilities. Alternatively, if KURTZ intends the term "on duty" to mean "during working hours" (whether an employee is inside a public facility or not, on break or not, on duty or off duty), then the ACLU is apparently advocating that public employees be literally chained to their desk, electronically monitored, or

While the City could continue to itemize all the misleading "factual" statements in KURTZ's brief, there would then be no space left to address the constitutional principles at issue here, which are much too important to be lost in the KURTZ smokescreen of non sequitur and solecism.[9]

C. KURTZ's statements about the privacy case law are incorrect: KURTZ writes that *Winfield, In re T.W.*, and *In re Browning* are relevant because the City, for ideological reasons, is seeking to mandate a healthy and wholesome lifestyle. But there is not one shred of evidence in the record to support that statement, and it is refuted by the obvious fact that the City has not implemented any smoking policy to restrict or govern the behavior of

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shadowed by the "smoking police" whenever they depart a government facility, which is precisely what occurred during *Grusendorf* and is a far more intrusive policy than the one actually at issue.

[9] Incidentally, KURTZ takes umbrage at the City's suggestion of tobacco-industry contributions to the ACLU, yet never actually disputes or denies that suggestion and instead erects a "straw man" argument that KURTZ's **counsel** did not personally receive tobacco industry funding (which the City never suggested). In point of fact, during KURTZ's deposition the City specifically inquired about funding for the litigation and KURTZ's attorney objected and stated that she had no obligation to disclose the funding source but that the tobacco industry may have provided funding to the ACLU.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 91-3165 CA-15

ARLENE KURTZ,

Plaintiff,

vs.

THE CITY OF NORTH MIAMI, FLORIDA,

Defendant.
_____/

TABLE OF CONTENTS FOR DEFENDANT'S COMPOSITE EXHIBITS "I" THROUGH "IV"

A. Composite Exhibit "I":

1. "Journal of Public Health Policy", The Minnesota Plan for Nonsmoking and Health: The Legislative Experience, by James M. Schultz, et. al.

2. "The Milbank Quarterly", The Economic Costs of the Health Effects of Smoking, 1984, by Dorothy P. Rice, et. al. (Cambridge University, Vol. 64, No. 4, 1986).

3. "U.S. News & World Report", Big Tobacco's Toughest Road by Andy Plattner, (April 17, 1989).

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12. "Economic Costs of Smoking & Benefits of Quitting for Individual Smokers" by Gerry Oster, et. al., (Academic Press, Inc. 1984).

13. "Health and Economic Implications of a Tobacco-Free Society" by Kenneth E. Warner, Ph.D., (Journal of the American Medical Association, October 16, 1987, Vol. 258).

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B. Composite Exhibit II:

1. "Guide to Public Health Practice: State Health Agency Tobacco Prevention and Control Plans" by Association of State and Territorial Health Officials, et. al.

2. "Smoking, Tobacco & Health", a Fact Book.

3. "Smoking and Health, A National Status Report", A Report to Congress Second Edition.

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C. Composite Exhibit III:

1. "Surgeon General's Warning".

2. "Smoking's Cost to Society is $52 Billion a Year, Federal Study Says" by Philip J. Hilts, The New York Times National.

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4. "MMWR Morbidity and Mortality Weekly Report", Smoking-Attributable Mortality and Years of Potential Life Lost – U.S. 1988, (February 1, 1991, Vol. 40, No. 4).

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18. "Health and Economic Implications of a Tobacco-Free Society" by Kenneth E. Warner, Ph.D., JAMA, (October 16, 1987, Vol. 258, No. 15).

19. "The Health Consequences of Smoking, Nicotine Addiction", A report of the Surgeon General.

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21. "Economic Incentives to Reduce Employee Smoking: A Health Insurance Surcharge for Tobacco Using State of Kansas Employees" by Maurice Penner, (September/October 1989, Vol. 4, No. 1).

22. "Measuring Medical Cost and Life Expectancy Impacts of Changes in Cigarette Scales" by Barbara C. Lippiatt, M.A.

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D. **Composite Exhibit IV, Part I and Part II:**

1. "Reducing the Health Consequences of Smoking, 25 Years of Progress", a report of the Surgeon General, (1989).

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